Communiqué

SEPTEMBER, 2002

IN THIS ISSUE:

Hit your Back Button to return to the top of this index.

Regular Columns

President's Report

Bencher's Meeting Highlights

From the Equity Ombudsperson

Allan's Odds and Ends

Membership Changes

Special Features

Conveyancing Protocol Gaining Lender Acceptance

The New *Legal Profession Act*

Western Accounting Rules Harmonization Working Group

125th Anniversary Dinner

Fast Lawyers

Notices to the Profession

Notice of Benchers' Meeting

Law Office Searches

Notice Re: Referral Fees

Notice Re: Spousal Wills

PRESIDENT'S REPORT

Lori T. Spivak
President

As I begin my term as President, I want to express my gratitude to my fellow Benchers for entrusting me with this privilege. I have been involved in the Law Society for eight years and have served in different capacities, and I look forward this new challenge. I want to particularly thank Tim Killeen for an outstanding ye of service and the consideration he showed me in the past year.

Recently I had the privilege of making a number of speeches on behalf of the Law Society of Manitoba. I had the honour of addressing the Bar Admission students at the Call to the Bar ceremony and the first year law students on their first day of classes. This was an opportunity t officially welcome our new and future members to the legal profession. It was also an occasion to reflect upon and reinforce the values we cherish as a profession.

In addressing these groups I thought a lot about what is important about being a lawyer and what qualities should guide you in your professional life. There are those that have observed that moder society, with its economic pressures, dehumanization and depersonalization, threaten the ideals of

our profession. I believe it is important to promote the traditional values of our profession and spen some time trying to keep the idealistic sense of professionalism vibrant. Being a lawyer means having a commitment to professionalism - a recognition that the legal profession exists in the publi interest to advance the cause of justice and the rule of law. Public service is central to professionalism. Public service takes many forms. There are many examples of lawyers who embo the spirit of public service by remembering that the most basic aspect of being a lawyer is helping others and contributing their talent, knowledge and time through pro bono work, work in the profession, and community organizations

It is also important to maintain the independence of the legal profession by ensuring that we preser our rights of self governance and recognize that this right is a privilege. All of us play a role in guarding this privilege. Public confidence and protection of its interests are essential to maintaining our independence. We must, therefore, be vigilant to not erode public confidence in our capacity to govern.

There are a number of issues being addressed by the Law Society at this time. I want to take this opportunity to discuss an important area where we have been making great strides - national mobility. This is an issue that law societies across Canada have made a priority. The issue of nation mobility is seen as an inevitable consequence of the direction in which the legal profession is moving. Mobility is favoured as it removes artificial barriers, enhances the well-being of lawyers b creating new markets and business opportunities and fosters greater access to justice by allowing lawyers to service clients seamlessly across borders.

As you are aware, in June 2001 we passed rules that allowed most lawyers in Manitoba to practise other Western provinces for up to six months in any one-year period without being required to appl for practising status. Last summer in Saskatoon the Federation of Law Societies set up a Task Forc on Mobility to examine full mobility rights and conditions for Canadian lawyers. It was recognized that, as the world was becoming smaller and transactions travel across provincial boundaries, there a greater need for legal services to follow the client. The Task Force built on the Inter-Jurisdictiona Practice Protocol signed in 1994 (which permitted lawyers in good standing to provide legal servic in any other province covered by the agreement for a maximum of 10 matters over 20 days in a 12 month period.) It considered the more permissive protocol established by the four western province known as the 6-12 rule.

The Task Force recognized the importance of creating provisions that would govern both temporar and permanent mobility and recognized that any scheme developed had to protect the public interes At the last meeting of the Federation of Law Societies in August 2002, the Federation approved the final report of the Task Force. A model rule is to be developed based on the Agreement. All law societies in Canada (except the Territories) have indicated an intention to sign the Agreement.

The Agreement provides as follows. Temporary mobility addresses situations where lawyers seek t provide legal services in jurisdictions other than those where they are members of the Bar (i.e. host jurisdictions) without establishing an economic nexus with the jurisdiction. This might include a situation where lawyers are providing service to a particular client from their home jurisdiction, where lawyers are handling a single transaction or trial, or where they are providing legal opinions across multiple jurisdictions in a substantive area of law where they have a particular expertise. Permanent mobility addresses those situations where they have a clear economic nexus to the jurisdiction (i.e. where the lawyer sets up an office) to the extent that the lawyer should not be distinguished from those who are members of the Bar of that jurisdiction.

The bottom line is this: Lawyers will be able to practise for up to 100 days a year in jurisdictions th sign the Agreement (except in Quebec where there will be limited mobility provisions). There is no "check-in" requirement. In order to qualify for temporary mobility without a permit the lawyer mus have no discipline record and not be the subject of criminal or disciplinary proceedings. Those lawyers can still be mobile but will have to obtain a permit from the host jurisdiction. If a lawyer establishes an economic nexus in another jurisdiction (i.e. opens an office or practices more than 1(days in a year) the lawyer has to become a member of that other jurisdiction. The important change is that they will no longer be required to write a transfer exam. The lawyer would be required to rea a set of materials that summarize what is unique about the law of that jurisdiction and provide an undertaking that they have reviewed all of the materials. On application a lawyer will be exempt from liability insurance requirements if the lawyer has equivalent insurance in another signatory jurisdiction. This will be of interest to Manitoba lawyers who practice in northwestern Ontario and have been required in the past to pay two insurers.

There is some further work to be done. A model rule is to be developed and working groups have been established to consider ways to harmonize insurance and compensation provisions. That said, lot has been accomplished in a relatively short period of time.

Benchers' Road Trip

Allan Fineblit, Q.C.
Chief Executive Officer

There was the bus, the Benchers and the open road. It was Friday the 13th and even more ominous, the promise of free liquor at the end of the day in Shilo, at a reception for incoming MBA President Brian Midwinter. A recipe for trouble if I ever saw one! Here is some of the mischief the Benchers got into at their meeting in Brandon.

- The Benchers approved a resolution changing our financial institution to the Assiniboine Credit Union, in part to reflect the willingness of the Credit Unions to embrace the Western Canadian Conveyancing Protocol;
- President **Lori Spivak** reported on the meeting of the Federation of Law Societies where a new mobility agreement, new governance structure and a resolution encouraging additional funding for Legal Aid were all approved;
- A general discussion took place about money we spend on a grant to the Lawyer Referral Service, student awards and the publication of public legal education materials. Benchers are generally of the view that we should fund those things that support our mandate and left it to the CEO to determine which expenditures were most appropriate in that context;
- The Benchers reviewed the new ***Legal Profession Act***. This new act received Royal Assent o August 9, 2002 and comes into effect on October 31, 2002. It replaces the Law Society Act and implements several changes that the Benchers had requested…and its 25% smaller then the old Act. (see separate article for some details);
- The Benchers will need to pass new rules consistent with the Act. Several policy issues were considered including:
    - Should the new Act apply to on-going discipline matters? Benchers' answer: **Yes**
    - Should Benchers be allowed to change their status during their term of office to either non-practising or inactive and remain a Bencher? Benchers' answer: **Yes**

  - What should the quorum be for the next annual general meeting? Benchers' answer: T **same as for a Benchers meeting**
  - Should we set a time limit on appeals to the Complaints Commissioner? Benchers' answer: **Yes, ninety days**
- A **new set of rules** will incorporate the policy discussions and be presented to the Benchers f approval when they next meet on October 31, 2002;
- The Benchers considered the report of the Federation of Law Societies **Mobility Task Force** and the Mobility Agreement approved by the Federation of Law Societies. Once the rules are approved by each participating jurisdiction, the lawyers will be free to practise anywhere in Canada for up to one hundred days a year, and can become a member of any other Canadian law society without writing a transfer exam. (Note: special rules apply to mobility in and out of Quebec. Also note that the Yukon, North West Territories and Nunavut are not participati in the agreement.) Manitoba Benchers approved the Mobility Agreement which will come in place in Manitoba once the rules being prepared by the National Mobility Committee are passed;
- The Benchers reviewed a monitoring report on the **insurance program** and noted a significa drop in the number of claims last year. The Benchers considered a proposal from our reciprocal insurer, the Canadian Lawyers Insurance Association, to increase mandatory coverage from one million dollars per occurance to two million dollars. The matter will be further considered by our insurance committee;
- The Benchers reviewed a monitoring report on our four month **financial statements** to July 31, 2002 (we are pretty much on target on every fund) and the monitoring report on our investment performance which shows that, like the rest of the world, we aren't making any money (our investments decreased in value by 1.79% in the first quarter of our fiscal year).
- The Benchers said goodbye to Student Bencher **Nancy Fazenda** who was attending her last meeting.

Workplace Harassment Very Expensive for Employer in Recent Ontario Court of Appeal Ruling

Brenlee Carrington Trepel
Equity Ombudsperson

A workplace free of harassment and discrimination can also be free of expensive court damage rulings, as demonstrated by a July, 2002 decision of t Ontario Court of Appeal.

The court upheld the trial judge's award of $15,000 against an employer for mental distress. The Court of Appeal's comments indicate why respectful workplace initiatives are so important for legal employers and indeed for all employers.

Prinzo v. Baycrest Centre for Geriatric Care [2002] O.J. No. 2712, involved a department manager, Iole Prinzo, with 17 years' seniority who experienced workplace harassment stemming from her physical disability. Prinzo's supervisor persistently placed "harassing" phone calls to her at home trying to "coerce" her to return to work despite her physician's corroboration that she was in no condition to do so, and despite her physician's letter stipulating that she was medically unfit to retu

to work.

Prinzo ultimately succumbed to the harassment and returned to work. She was terminated despite h comment that she was in no condition to discuss leaving her job.

The court accepted her physician's testimony that the way Prinzo was treated caused her emotional upset and health problems including "a loss of self-esteem and distress on a disabling basis for months after leaving her position as a result of Baycrest's conduct."

The Supreme Court of Canada, in McKinley v. B.C. Tel., [2001] 2 S.C.R. 161 at para. 82, indicatec that awarding damages for mental distress required that the employers "acted with an intention to harm the employee either by deliberately inflicting mental distress or by acting in a discriminatory manner."

In Prinzo, the Ontario Court of Appeal went much farther.

The Ontario Court of Appeal noted the fact that in previous employment law court decisions, "damages for mental distress arising from the tort of intentional infliction of mental suffering have also been awarded where, for example, an employee was severely harassed by a superior who had knowledge of her fragile mental state (Boothman v. Canada, [1993] 3 F.C. 381); an employee suffered sexual harassment from her colleagues and supervisors (Clark v. Canada , [1994] 3 F.C. 323), and where an employee was subjected to a confrontational, brash and contradictory management style (Bogden v. Purolator Courier Ltd., [1996] A.J. No. 289)."

The Court of Appeal went on to state that the tort of intentional infliction of mental suffering requires proof of the following elements: "(1) flagrant or outrageous conduct; (2) calculated to produce harm; and (3) resulting in a visible and provable illness."

The court held that "the tort of intentional infliction of mental distress is a separately actionable wrong."

In Prinzo, the trial judge's finding was that the "acts of harassment by [Baycrest] were so extreme and insensitive that they constituted a reckless and wanton disregard for the health of [Prinzo].

The trial judge also found that "Baycrest was well aware of the physical and emotional health of th plaintiff and would realize the detrimental effect their harassment would have on the plaintiff and y they persisted in such harassment with almost sadistic resolve."

Finally, the visible and provable illness was the emotional distress for Prinzo which "was manifestc in physical illness documented by a physician."

The above case is just one example of the reason it's so important for all colleagues and clients to b treated with respect and dignity.

If you have any discrimination or harassment concerns; if you would like assistance with developin respectful workplace policies; if you'd like to meet with me, or if you'd like me to speak at your office, please contact me confidentially in Winnipeg at 942-2002, or toll free from anywhere in Manitoba at 1-866-771-2002, by mail at P.O Box 2555-Station Main, Winnipeg, R3C 4B3, by e-ma at brenleecarrington@shaw.ca or by fax at 474-1161. All services are provided free of charge.

Allan's Odds and Ends

- **Joe Gallagher**, General Counsel to the Law Society for six years has left us sad and grumpy (us, not him) to become a policy advisor to Minister of Veterans Affairs, Rey Pagtakhan. Joe will be missed for his wise counsel and good friendship. Here is how we will fill the gap he leaves behind: Auditor Gerry Payne will dispense general car repair tips on an as-needed bas Richard Porcher will shovel the snow in the mornings; Ryan will take over all of Joe's golf, curling and baseball responsibilities (that Ryan… always prepared to make the big sacrifices! Tana Christianson will be responsible for having the cleanest car in the parking lot; I will tak responsibility for wearing a white shirt every day, and it looks like I'm going to have to buy my own pick-up truck.

  Seriously though…here is the new program so you can tell the players: **Kris Dangerfield** ha: been appointed Senior General Counsel (a new title) and **Darcia Senft** will take over Joe's General Counsel responsibilities; **Leah Kosokowsky** will take over Darcia's old job as Director of Discipline (responsible for the complaints investigation department) when she returns from her maternity leave in February and **Richard Porcher** will be Acting Director o Discipline in the interim. There is an ad in this mailing to replace Leah as Complaints Investigator. Still with me?

- The Partnership Act and the Law Society Act were amended in the last session of the Manitoba Legislature to permit **limited liability partnerships**. The Partnership Act amendments have not yet received Royal Assent so don't start reorganizing your life quite yc We'll make sure full details are in your hands once we know the effective date of the Partnership Act amendments (expected to be some time before the end of 2002).

- **Herb Peters** was appointed as the Law Society representative to the Minister's Advisory Committee on Judicial Appointments. Speaking of judicial appointments, congratulations to Justices Goldberg, Suche, Scurfield, Freedman and Hamilton. We are especially proud to not that four are past presidents of the Law Society of Manitoba and the other a former employee Congratulations also to new Chief Judge Ray Wyant (who is a fine fellow even though his only Law Society connection is as a regular Bar Admission lecturer), and new Associate Chi Judge Mary Kate Harvie.

- Did you know that Legal Aid Manitoba's St. Mary Avenue office won the Community in Bloom award for its remarkable front garden? Kudos to **Gail "the gardener" MacAulay** anc her grounds crew.

- The International Network on Law and Aging wants you. INLA is a global information sharing network of people who work on, or have a special interest in, issues relating to law a aging. If you are interested contact Alex Donahue at adonahue@aarp.org

- Remember our summer fun contests? Name the irrational fear that you get when someone from the Law Society phones you for perfectly innocent reasons. The winner is **Anita Southall** of Fillmore Riley who named it lexatelephobia. Thanks to everyone else who entere or just told me stories about your irrational fears.

- Best wishes from **Archie Kraut** who has retired after twenty nine years with the RCMP forensic lab. Archie writes "over the years I have consulted with members of The Law Societ on criminal code issues and professional development initiatives related to alcohol, particular with regard to impaired driving offenses. I think that it is very important for a forensic laboratory to be available for open discussion with counsel on criminal code issues and wher possible to provide assistance in court. I thank your members for the many professional opportunities they gave me to discuss forensic alcohol matters that were of concern to them a well as the personal contacts."

- I was sent a copy of "A Charter of Rights of a Client" prepared by the Tyrolian Bar on the occasion of their one hundred and fiftieth anniversary. If anyone wants it, I've got it (all you need to do is yodel.)

- If anyone wants information on the Youth Criminal Justice Act you can get it from Justice Canada's Web Site, http://canada.justice.gc.ca/en/ps/yj/rapository/letter.html

- Congratulations to **Jackson Mugerwa** who was elected the new Student Bencher. Jackson is articling with Legal Aid Manitoba.

- Greetings from **Bill Greenaway**, a self-described "recycled academic" who is currently livin in Guelph, Ontario and passing his time as a pub musician. Bill tells me that an article that he first published in 1980 has been re-published in a book called Criminal Law and Procedures, Cases, Context, Critique by Abell and Sheehy.

Membership Changes

The following members have voluntarily changed their status as indicated on the dates shown:

Inactive to Practising
May 1, 2002 Leah F. Craven
June 1, 2002 Peter Murdock
June 1, 2002 Stephen Lerner
June 3, 2002 Melinda R. Lofchick
June 14, 2002 Gary Dolovich
July 1, 2002 Patti-Anne Umpherville
Sept. 3, 2002 Patricia J. Ramage

Practising to Non-Practising
June 21, 2002 Robyn Singleton
June 30, 2002 Pamela H. Stewart
June 30, 2002 Paul J. McMullan
July 1, 2002 Rhonda Spivak
July 1, 2002 Gordon C. Steeves
July 2, 2002 Marni A. Yasumatsu
July 16, 2002 P. Colleen Suche, Q.C.
Aug. 16, 2002 Jocelyne Vigier

Practising to Inactive
June 1, 2002 Darren Beattie
June 7, 2002 Shauna Hewitt-Michta
June 14, 2002 S.R. Fainstein, Q.C.
June 14, 2002 Trevor M. Brown
June 25, 2002 Gary Dolovich
June 27, 2002 Kenneth McCaffrey
July 1, 2002 Catherine Hembroff
July 1, 2002 Julie-Ann Morgan
July 1, 2002 Carole E. Hreno
July 16, 2002 John Scurfield, Q.C.
Aug. 1, 2002 Patti-Anne Umpherville
Aug. 6, 2002 Mark Whittam
Aug. 30, 2002 Jason Neustaeter

Non-Practising to Practising
April 1, 2002 Jennefer Nepinak
June 1, 2002 Graham Robson
June 1, 2002 Nancy Martin
July 2, 2002 Ramona K. Jozsa
Aug. 1, 2002 Jeffrey M. Kuhl
Aug. 1, 2002 Estella Muyinda
Aug. 6, 2002 Jennifer Dunik
Sept. 1, 2002 Lynne Hiebert
Sept. 4, 2002 Andrea C. Dodgson

Conveyancing Protocol Gaining Lender Acceptance

Marilyn Billinkoff
Deputy Chief Executive Officer

The **Canada Mortgage and Housing Corporation** (CMHC) has confirmed its acceptance of protocol closings across Western Canada. CMHC has provided more than 3 million Canadians with mortgage loan insurance for almost 50 years. Several months ago, **GE Capital Canada**, the only private sector supplier of mortgage insurance coverage in Canada, also confirmed its acceptance.

Last year, **Credit Union Central** approved the use of the protocol in Manitoba in connection with conventional mortgages. Over the summer, Credit Union Central distributed a circular to all its member credit unions **approving protocol closings in connection with both insured and conventional mortgages**. As of July 31, 2002 the value of real estate loans secured against residential property by Manitoba's 63 credit unions exceeded $2.6 billion.

Correspondence received this summer from the **Canadian Western Bank** confirmed their support and use of the protocol. The bank indicated it had approved the protocol last summer and had successfully implemented protocol closings at the branch level.

In June, the **Investors Group** and **London Life** approved the use of the protocol across Western Canada for insured and conventional mortgages. Investors is the first national lender to embrace

protocol closings. The 2001 audited financial statements of the Investors Group show residential re estate loans for the company in excess of $470 million.

While members of the Western Law Societies Conveyancing Project continue their discussions wit other lenders to move the protocol forward, the **recent successes have largely resulted from the efforts of individual lawyers**, who view the protocol process as a safe and efficient way to serve their clients' interests. If you are considering talking to a lender about adopting the protocol proces and require any information to support your efforts please contact Marilyn Billinkoff at 926-2010.

The New *Legal Profession Act*

October 31, 2002

The *Law Society of Manitoba Act* ceases to exist after one hundred and twenty five years of dedicated service. For those who are worried that chaos will ensue, I am pleased to advise that out of the ashes of The Law Society of Manitoba Act rises the new Legal Profession Act which looks for the most part like a fine replacement. And while it may not last one hundred and twenty five years, is at least leaner, better organized and in plain language.

The *Legal Profession Act* gets rid of a whole bunch of detail and all the prescribed forms. Some of that will move to the rules but most will simply be dumped. The result is 69 pages instead of 93, which in and of itself is a good step.

What's been taken out? The detailed sections dealing with elections and inter-jurisdictional law firm have been replaced with sections giving Benchers general rule-making power regarding those things In spite of our objection, the Q.C. provisions are gone (though existing Q.C.'s retain their designation and/or precedents). The requirement for a new lawyer to swear the Oath of Allegiance and Barrister and Solicitor Oaths are gone.

There are some new things in the *Legal Profession Act* that weren't in the old *Act*. The purpose and duties of The Law Society of Manitoba are set out, and while there are no surprises, it is the first tir the *Act* actually spells it out. The section reads "The purpose of the Society is to uphold and protect the public interest in the delivery of legal services with competence, integrity and independence."

There is a section permitting lawyers to practice in limited liability partnerships (see the Odds and Ends column for more information). A new discipline disposition is now available allowing the Discipline Committee to permit a member to resign, as a penalty for professional misconduct, conduct unbecoming or incompetence.

You will all get a copy of the new *Act* next month and it should make your green binder a little thinner. We hope you also find it more serviceable and user friendly.

Western Accounting Rules Harmonization Working Group

The four Western Law Societies have established the Western Accounting Rules Harmonization Working Group to review the trust accounting rules in each province in an attempt to create a harmonized set of accounting rules.

In connection with this project, a separate sub-committee was recently formed (EFT Working Grou to review and make recommendations on electronic fund transfer issues. Such issues include PC banking, wire transfers, ATM banking and cheque imaging issues.

If you have any comments relating to EFT issues, or any of the trust accounting rules, that you wou like the Committee to consider, please contact Sherri Jack, Director of Audit, or Nancy Zacharias, Auditor-Inspector, at 942-5571.

125th Anniversary Dinner

Here is the top ten list of things you need to know about the dinner:

10. **Trevor Anderson** is the only speaker and he'll be very funny.

9. Tickets are in limited supply so order early to avoid, well …disappointment.

8. We are honouring eight lawyers who practised fifty years or more. They are Harold Buchwald, Q.C., Walter Dowhan, R. Kenneth Halprin, Yude M. Henteleff, Q.C., Harold K. (Bud) Irving, Q.C. John S. Lamont, Q.C., Gordon M. Pullan, Q.C. and J.F. Reeh Taylor, Q.C.

7. We have pictures, old ones, with bad hair.

6. Our special guest of honour is **Harold Stubbs, Q.C.**, Secretary Emeritus of The Law Society.

5. You get a tax receipt for the portion of the ticket price and that will be used to establish an endowment.

4. I know tickets are expensive but it will be a fancy do and we have reduced-price tickets for any one who can't afford it. (Just mention you'd like a reduced price ticket when you order your tickets

3. The date is Thursday, October 24, 2002, the place is The Fort Garry Hotel, the time is 6:30 for drinks and 7:30 for dinner.

2. You can reserve tables.

1. There is free stuff to take home for your kiddies (or somebody else's) …and did I mention we have pictures?

Fast Lawyers

Allan Fineblit, Q.C.
Chief Executive Officer

I promised to tell you about all the lawyers I spotted running for a good cause in the Manitoba Marathon. **Grant Mitchell** was the fastest lawyer I spotted in the full marathon, finishing in just under three hours and thirty-eight minutes. I didn't actually have to spot Grant, since he sent me a lengthy e-mail describing his run pretty much step-by-step. It actually took me longer to read the e-mail then it did for **Harley Boles** to run the half marathon (he finished with a great time of one hou and twenty-five minutes.) Other fast lawyers in the half marathon were Keith Addison, Mark O'Neill, Allan Stewart, Saul Simmonds, Reuben Potash, Michael Thomson, Denis Guénette, Allan Foran, Steve Johnston, Arne Peltz, Rob Giesbrecht, Marty Minuk, Vic Bargen, Greg Hawrysh, Joe Gallagher, Iris Allen, Judge John Guy, Marta Smith, Carena Roller, Gerry Parkinson, Ross Antymniuk, Cathy Finnbogason, Don Campbell, Linda Vincent, Craig Murray and Michael Dow. Let me know who I missed and I'll be sure to mention them in the next Communiqué.

Notice of Benchers' Meeting

The next meeting of the Benchers of the Law Society of Manitoba will be held on Thursday, Octob 31, 2002 at 12:30 p.m. in the Society's classroom, 219 Kennedy Street, Winnipeg, Manitoba. Members of the Society are encouraged to attend and participate in the deliberations of the governi body.

Law Office Searches

You should be aware that the law has just changed in regard to search procedures for lawyers' offices. In the Supreme Court of Canada case of R v Lavallee, S.488 of the Criminal Code of Cana that establishes a procedure for dealing with issues of privilege when a law office is searched, was struck down. We will send you a more detailed notice in due course, but for the time being it is important that you know that in a rare event of a search involving potentially privileged client materials, the drill has changed and you should have reference to the decision (which can be accessed at www.canlii.org).

Notice to the Profession Re: Referral Fees

On June 27, 2002, the Benchers of The Law Society of Manitoba approved amendments to Chapte 11 of the Code of Professional Conduct to allow for the payment of referral fees. Commentary 8 to the Rule provides that:

"Where a lawyer refers a matter to another lawyer because of the expertise and ability of the other lawyer to handle the matter and the referral was not made because of a conflict of interest, the referring lawyer may accept and the other lawyer may pay a referral fee provided that:
(a) the fee is reasonable; and

(b) the client is informed and consents."

Chapter 2, Commentary 2 of the Code of Professional Conduct provides that a lawyer should not undertake to handle a matter without honestly feeling either competent to handle it, or able to become competent without undue delay, risk or expense to the client. Through the amendment to Chapter 11, the Law Society encourages all members of the profession to ensure that their clients receive competent legal representation. This can be accomplished by referring clients to lawyers wl possess the expertise and ability to best represent the legal interests of those clients.

It would be a prudent practice for those contemplating the payment of a referral fee to enter into a written referral fee agreement. The terms of the agreement ought to reflect the substance of the rule and in particular, it should:
(a) acknowledge that the recipient lawyer has the expertise and ability to handle the matter;
(b) acknowledge that the referral is not made because of a conflict of interest;
(c) specify the amount or method of calculating the referral fee payment;
(d) reference the client as a party to the agreement, with the client acknowledging his/her consent t(the terms of the agreement; and
(e) be signed by both the referring lawyer and the recipient lawyer.

The Practice and Ethics Committee reminds members that the referral fee, as with any other fee, must be fully disclosed, fair and reasonable in accordance with the provisions of Chapter 11 of the Code of Professional Conduct. The factors to be considered in ensuring that it is fair and reasonabl(are set forth in Commentary 1, Chapter 11.

Notice to the Profession Re: Spousal Wills

Members are frequently retained to prepare wills on behalf of a husband and wife. The lawyer mee with the spouses to review their assets and to take instructions. The wills are prepared and executed What is the lawyer's ethical obligation if one spouse subsequently returns and asks that his/her owr will be altered, but does not wish those alterations to be made known to the other spouse? Should that information be conveyed to the other spouse? Must it be conveyed to the other spouse? In the event that the lawyer does not convey the information, has the lawyer breached a duty owed to the unsuspecting spouse? If the lawyer does convey the information, has the lawyer breached a duty owed to the spouse who made the request? How does one avoid being placed in this jackpot in the first place?

The lawyer who takes joint instructions from a couple for the preparation of their wills should be guided by the provisions of Chapter 4 and Chapter 5, Commentaries 5 and 6 of the Code of Professional Conduct as they pertain to joint retainers. A joint retainer is one in which a lawyer is employed by more than one client in a matter or transaction. Prior to accepting the retainer the lawyer should advise those clients that:
(a) The lawyer has been asked to act for both of them;
(b) No information received in connection with the matter from one may be treated as confidential : far as the other is concerned; and (c) If a conflict develops that cannot be resolved, (i.e. one client later requests changes that conflict with the instructions of the other) then both individuals must be referred to other counsel.

In order to satisfy him or herself that the spouses are in agreement with respect to the distribution o their respective estates, the lawyer may meet with the spouses separately prior to the execution of tl wills.

If one spouse later requests that his/her own will be altered, but does not wish those changes to be made known to the other spouse, it is the opinion of the Practice and Ethics Committee that accepting the retainer could infringe Chapter 5, Commentary 8 of the Code of Professional Conduc which prevents a lawyer from acting against a client in the same or any related matter. Accordingly the prudent course of action on the part of the lawyer would be to decline the new retainer. It is alsc the view of the Committee that such a communication is made in confidence to the member and would not be the subject of the earlier joint retainer. The communication should therefore not be disclosed to the other spouse in the absence of the client's consent or unless a contrary authorizatio was obtained from both clients either at the time of, or subsequent to the joint retainer. The lawyer should be guided by Chapter 4 of the Code of Professional Conduct with respect to confidential communications.

COMMUNIQUÉ BACK ISSUES

May, 2002
February, 2002
November 2001
July 2001
December 2000
September 2000
May 2000
January 2000
October 1999
May 1999
January 1999
September 1998
May 1998